No. 82-1474

IN THE

Supreme Court of the United States

October Term, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS, and HOWARD J. WOLFINGER,

Petitioners,

vs.

EDWARD D. RONWIN,

Respondent.

In Support of Petitioners On Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND AMICUS CURIAE BRIEF OF THE STATE BAR OF CALIFORNIA.

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vs.

EDWARD D. RONWIN,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The State Bar of California respectfully moves for leave to file the accompanying Amicus Curiae Brief in support of Petitioners. Petitioners have consented to its filing; Respondent has refused. The State Bar of California appeared as amicus curiae before the Court of Appeals both on Petitioners' original motion for rehearing and on the motion for rehearing which followed the issuance of the Court of Appeals' amended opinion.

I.
THE STATE BAR OF CALIFORNIA'S INTEREST IN THIS PROCEEDING.

The State Bar of California is a public corporation. It exists as a constitutional agency under the judicial branch of California government. CAL. CONST. art. VI, § 9. Its Committee of Bar Examiners, like the Arizona Supreme Court's Committee on Examinations and Admissions, is a state agency. CAL. BUS. & PROF. CODE §§ 6046, 6046.5 (West Supp. 3B 1983).

As is the case in Arizona, California's committee is charged with the responsibility of examining all bar applicants and certifying to the state supreme court those who fulfill the established

requirements for admission. *Compare* CAL. BUS. & PROF. CODE § 6046 (West 1974), *with* ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). In both California and Arizona the committee acts as an "arm" of its respective supreme court "for the purpose of assisting in matters of admission", with the ultimate admission authority remaining within the plenary authority of the court. *Compare Preston v. State Bar*, 28 Cal. 2d 643, at 650, 171 P.2d 435, at 438 (1946), *with* ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). Moreover, again as in Arizona, California's committee employs "scaled scoring" in the grading of the multi-state portion of its bar examination. The California State Bar's Committee of Bar Examiners will accordingly be directly impacted by the Court's decision in this case.

II.
THE PROPOSED AMICUS CURIAE BRIEF.

The California State Bar's proposed brief seeks to demonstrate that the issues before the Court are not peculiar to Arizona. If anything, the impact of any decision significantly limiting the discretionary role of subordinate state agencies will be even more disruptive to the governance of a large bar such as California's than to the management of the lesser numbers practicing in Arizona.

The proposed brief argues that the Court of Appeals' decision is incompatible with the states' continued ability to make effective use of administrative agencies as part of their governmental structure. It is urged that such a result not only represents poor policy, but is the product of a legal standard which is contrary to the one employed by this Court in measuring the applicability of the Sherman Act to official governmental conduct.

The proposed brief next takes up the matter of state supervision and considers the unresolved issue as to whether, and if so to what extent, the exemption of official as opposed to private conduct may be dependent on such review. The suggestion is made that a flexible requirement which takes cognizance of the degree to which the agency is independent of its regulatory constituency may prove the most effective approach. Lastly, the proposed brief argues that the various damage immunities available to public

officials at common law should not be deemed abrogated by the Sherman Act.

As to each of these arguments, the proposed brief takes an approach and perspective which is distinct from that taken by the parties. By its last argument, it treats of an issue which is otherwise wholly unaddressed.

III.
CONCLUSION.

For all of the reasons set forth, the State Bar of California respectfully requests that its motion for leave to file the attached brief as amicus curiae be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE STATE BAR OF CALIFORNIA.

I.
INTEREST OF THE STATE BAR OF CALIFORNIA AS AMICUS CURIAE.

Like its Arizona counterpart, the Committee of Bar Examiners of the State Bar of California is a state agency. In Arizona the Supreme Court's Committee on Examinations and Admissions has been established by rule of the Arizona Supreme Court. ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). In California, the State Bar's Committee of Bar Examiners derives its existence from legislative command. CAL. BUS. & PROF. CODE §§ 6046, 6046.5 (West Supp. 3B 1983). Pursuant to the administrative scheme of each state, its respective committee is charged with the responsibility of examining for substantive qualification all applicants who otherwise fulfill the established requirements for admission. *Compare* ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973), *with* CAL. BUS. & PROF. CODE § 6046 (West 1974).

In each case, the committee acts as an "arm" of its respective supreme court "for the purpose of assisting in matters of admission. . . ." *Compare Preston v. State Bar*, 28 Cal. 2d 643, at 650, 171 P.2d 435, at 438 (1946), *with* ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). Consistent with this role, each committee's certification is advisory only with final authority as to admission remaining within the plenary power of the respective state's supreme court. *Compare Preston v. State Bar, supra, with Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1958).

Among the various statutory qualifications which a California applicant must meet to be certified to the court for admission is the successful passage of a "final bar examination given by the examining committee." CAL. BUS. & PROF. CODE § 6060(f) (West Supp. 3B 1983). While the ultimate admission determination is made by the court, it is apparent that its seven members, given their other responsibilities, cannot themselves conduct the examination. Indeed, the California Supreme Court observed in as early as 1934 that: "No court can so examine more than five

hundred, or nearly a thousand, applicants and conduct its regular business." *In re Admission to Practice Law*, 1 Cal. 2d 61, at 69, 33 P.2d 829 at 832 (1934). By 1982, the number of applicants who sat for one or another of California's various bar examinations had increased to over 12,000.[1] Accordingly, if it is to be administratively possible for the court to meets its admission function, the committee, and not the court, must arrange for the composition, administration, and grading of the examination. *Cf.* CAL. BUS. & PROF. CODE § 6047 (West 1974).

This responsibility always has and always will subject the committee's members to accusation by unsuccessful candidates that the examiners "arbitrarily . . . [d]etermined in advance the number of applicants who should be permitted to pass the examination" and to that end selected "very hard" questions, established an "arbitrary" grading scale, and generally "refused" to fairly consider the "qualifications" of the applicant. *See In re Admission to Practice Law*, *supra*, at 63, 65, 33 P.2d 829, at 830, 831. But such charges are fully subject to review in the California Supreme Court which has plenary authority to re-examine the "entire record" of the challenged examination and, if warranted, order re-grading of the examination, modifications of the committee's rules, or the admission of uncertified applicants. *See id.* at 65-66, 33 P.2d at 831; *Brydonjack v. State Bar*, 208 Cal. 439, 445-46, 281 P. 1018, 1021 (1929); CAL. BUS. & PROF. CODE § 6066 (West 1974). Moreover, where the state supreme court determines to deny admission, any claim that such action is in conflict with the United States Constitution or any other allegedly preemptive federal law, including the antitrust laws, is subject to review in the United States Supreme Court by writ of certiorari. *Konigsberg v. State Bar of California*, 353 U.S. 252, 258 (1957); *cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 353 (1977).

Prior to the Court of Appeals' decision in the instant case, it was generally understood that such procedure constituted the exclusive means by which a disappointed applicant could seek individual redress with respect to his or her examination failure.

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[1]Los Angeles Daily Journal, June 2, 1982, at 1; Los Angeles Daily Journal, November 30, 1982, at 1.

See Brown v. Board of Bar Examiners, 623 F.2d 605, 609-10 (9th Cir. 1980), *cited with approval in District of Columbia Court of Appeals v. Feldman*, ... U. S. ...., 103 S.Ct. 1303, 1316 n.17 (1983). While that procedure provided the applicant with a fair opportunity for review, it likewise permitted the members and staff of the Committee of Bar Examiners to devote most of their limited time to the performance of their official functions. The decision of the Court of Appeals upsets that established balance by subjecting each committee member to the substantial diversion occasioned by an obligation to submit to the full panoply of individual discovery demands which are now placed at the disposal of every disappointed applicant who is prepared to allege that his or her examination failure was "arbitrary" and "anticompetitive."[2]

The State Bar of California is deeply concerned that the decision of the Court of Appeals will result in serious interference with its committee's ability to effectively carry out its responsibilities. Not only will it prove more difficult to attract quality volunteers to serve, but there is some unquantifiable danger that those who do serve will be deterred from that vigorous and independent exercise of responsibility which is so essential to the public interest. *See generally Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

In light of the importance of this matter to California, its State Bar wishes by this brief to make clear that the issues to be decided are not matters peculiar to Arizona. On the contrary, those issues concern fundamental precepts which are central to the effective administration of bar admissions processes throughout the country.

II.
STATEMENT.

Respondent's complaint contains a single claim for relief: the recovery of treble-damages in the amount of $1,200,000 from the individual members of the Arizona Supreme Court's Committee on Examinations and Admissions on account of their alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

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[2]*See Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962).

(J.A. 5.)[3] In apparent recognition that any claim seeking to effect Respondent's admission to the Arizona bar by way of injunction would be beyond the jurisdiction of the District Court,[4] damages is the only remedy sought. *Ibid.*

The gravamen of Respondent's claim concerns the activities of the Petitioners, acting as the Arizona Supreme Court's Committee on Examinations and Admissions, in conducting the winter 1974 Arizona bar examination. (J.A. 8-11.) While Petitioners allegedly announced prior to the examination that a "grade of Seventy" would be required to pass, they "did not grade on a Zero to One Hundred (0 to 100) scale; rather, they used a 'raw score' system." (J.A. 9-10.) Pursuant to this "system", after the examination pool's raw scores were determined Petitioners established "a particular raw score value as equal to the passing grade of Seventy." (J.A. at 10.) Thus, the number of applicants who received a passing grade depended upon the raw-score value determined "as equal to Seventy", rather than on the applicants' achievement of a "pre-set" raw-score standard. *Ibid.*

The grading system so alleged is a procedure commonly known as "test standardization" or "scaled scoring." Its purpose is to identify an absolute level of achievement which remains constant despite inevitable variances in the degree of difficulty presented by necessarily non-duplicative succeeding tests. This is achieved through statistical correlation of a current applicant pool's relative performance on a limited number of repeat or control questions as compared to the performance of previous pools on those identical questions. This correlation is then statistically compared with the current pool's performance on its overall examination as com-

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[3]The complaint named the spouse of each committee member and the State Bar of Arizona as additional defendants. (J.A. 1, 3-4.) The Court of Appeals' ruling in affirming the District Court's dismissal as to those defendants was the subject of a separate Petition for Certiorari which was denied by this Court. *Ronwin v. Hoover*, ... U.S. ..., 103 S.Ct. 2110 (1983). Accordingly, neither those parties nor the issues involved in their dismissal are before the Court.

[4]*See District of Columbia Court of Appeals v. Feldman* .... U.S. ....., 103 S.Ct. 1303 (1983); *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980); *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968).

pared with previous pools' performance on their different overall examinations. By this process it is statistically possible to determine the degree by which the current overall test is either more or less difficult than the norm. Raw scores are accordingly adjusted up or down in such a manner as to result in an absolute measure of pass-fail performance which remains constant from examination to examination.[5]

This method does not result in any predetermined number of applicants either passing or failing, nor does Respondent so allege.[6] On the contrary, it is designed to assure that a more able current applicant pool in fact passes in greater number than a less qualified previous pool despite the fact that the current pool may have obtained a lower array of raw scores as a result of its having taken a more difficult examination. This is the exact antithesis of grading "on a curve" which is concerned only with the relative performance of members of a single applicant pool, and which, accordingly, can prejudice applicants in a stronger pool while rewarding applicants in a weaker pool.

The complaint concludes with the naked allegation that the committee's employment of this scaled scoring methodology constituted "a conspiracy and combination" which was "intended to and did result in a restraint of trade and commerce" by "artificially reducing the numbers of competing attorneys in the State of Arizona," and that Respondent was among the applicants so affected (J.A. 10-11).

While not alleged in the complaint, it is a matter of judicial notice that the Arizona Supreme Court enjoys plenary authority

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[5]*See* THE BAR EXAMINER'S HANDBOOK, pp. 61-62, 65-66 (2d ed. S. Duhl ed. 1980).

[6]Respondent's complaint alleges only that "the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy" (J.A. 10). This is, of course, no more than a truism. Respondent is careful *not to allege* that the manner in which the pass-equivalency raw score value was determined had anything whatever to do with the accommodation of any predetermined pass-fail ratio or any pre-determined limitation of the number of successful candidates.

concerning matters of admission to its bar.[7] It was pursuant to that authority that it appointed its Committee on Examinations and Admissions and charged it to "examine applicants and recommend to this court for admission" those "who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules. . . ." ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). "The court will then consider the recommendations and either grant or deny admission." *Ibid.*

Following the committee's failure to recommend Respondent for admission by reason of his not having achieved a standardized grade of 70, he was unsuccessful both in petitioning the Arizona Supreme Court for review and in petitioning this Court for a writ of certiorari. *See Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974).

It was on this record that the District Court granted Petitioners' motion for dismissal of Respondent's complaint for, among other reasons, "failure to state a claim upon which relief can be granted." (J.A. 23.) On appeal, a divided panel of the Ninth Circuit reversed as to Petitioners, determining that the complaint stated a cause of action for damages under the Sherman Act because Petitioners' employment of the grading procedures alleged did not qualify for the immunity accorded state action under the doctrine of *Parker v. Brown*.[8] (J.A. at 73, 83.)[9]

III.
SUMMARY OF ARGUMENT.

A.

We first argue that in determining whether conduct undertaken pursuant to state authorization is subject to the proscriptions of the Sherman Act, a distinction is made between conduct which

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[7] *Application of Levine*, 97 Ariz. 88, 397 P.2d 205 (1965); *Application of Burke*, 87 Ariz. 336, 351 P.2d 169 (1960); *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1958).

[8] 317 U.S. 341 (1943).

[9] 686 F.2d 692, 698 (9th Cir. 1982). The decision of the Court of Appeals as amended on rehearing appears in the Joint Appendix at 73. All citations will be to the appendix with footnotes supplying the parallel citations to the published report.

is essentially private and conduct which represents official governmental action. As to the former, a test involving some measure of state compulsion is used. As to the latter, however, it is only necessary that the conduct be authorized pursuant to a clearly articulated sovereign policy to replace competition with government regulation. We argue further that once such a state policy has been clearly declared, it is not necessary in delegating discretionary authority to subordinate agencies that the sovereign articulate every regulatory detail. Such a requirement would be inconsistent with the very function of agency administration and would effectively result in a prohibition against state use of this effectual form of government.

We point out that such an undesirable result is not suggested by the applicable precedents of this Court. On the contrary, we urge that a correct application of those precedents establishes that the activity in issue enjoyed sufficient sovereign authorization to qualify as state action beyond the scope of the Sherman Act.

B.

We next point out that a requirement for active state supervision has been established as a second criterion that must be met before private conduct can qualify as exempt state action. We argue, however, that this Court's decisions are unclear as to whether and to what extent such a requirement is applicable to governmental conduct, though plainly no universal requirement for such supervision has been imposed. We suggest that a flexible standard which takes cognizance of the degree to which the agency is independent of its regulatory constituency may prove most appropriate. We conclude by pointing out that the plenary role played by the Arizona Supreme Court in the bar admission process adequately meets any requirement for active state supervision which may be deemed applicable.

C.

We last argue that Petitioners are in any event entitled to the various damage immunities available to public officials at common law. Whether such immunities are abrogated by the Sherman Act is a matter of statutory construction. However, we point out that this Court has interpreted the equally general language of the civil rights acts as not evidencing a blanket Congressional

intent to override such immunities. Under this Court's precedents in the civil rights context, Petitioners would have a strong claim to both derivative absolute immunity and functional absolute immunity. Moreover, we argue that even if Petitioners were accorded only qualified immunity, they would in the circumstances of this case nevertheless be entitled to judgment.

We conclude by pointing out that the state-action focus of the civil rights laws implies a narrower role for governmental immunities than does the predominately private-action focus of the Sherman Act. Accordingly, if vigorous state regulation is not to be chilled, the Sherman Act must not be interpreted as abrogating or limiting any of the damage immunities available to public officials at common law.

IV.
ARGUMENT.

A. The Sovereign Authorization of the Official Activity Here in Issue Was Sufficient to Constitute Petitioners' Conduct State Action Beyond the Proscription of the Sherman Act.

It appears common ground between the majority and dissenting judges below that the Arizona Supreme Court's Committee on Examinations and Admissions is a state agency and that the Petitioners were acting in their official capacity as members of that agency in implementing the grading procedure in issue. (*Compare* J.A. at 79-80,[10] *with* J.A. at 100).[11] It also appears to be common ground that the question of whether or not such conduct is exempt from the Sherman Act as state action depends upon whether it was sufficiently authorized by the Arizona Supreme Court, the repository of the state's ultimate sovereign power with respect to matters of bar admission.[12] (*Compare* J.A. at 80-81,[13] *with* J.A. at 100-101).[14]

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[10]686 F.2d at 697.

[11]686 F.2d at 705.

[12]ARIZ. CONST., art. 3; *see also Bates v. State Bar of Arizona*, 433 U.S. 350, at 360 (1977).

[13]686 F.2d at 696.

[14]686 F.2d at 705-06.

The question that divided the Court of Appeals concerns the degree of specificity that the Arizona Supreme Court is required to articulate in delegating authority to its committee. The majority thought it necessary that the Arizona Supreme Court promulgate a rule "directly requiring the challenged grading procedure." (J.A. at 79.)[15] The dissent, on the other hand, thought it sufficient that the Arizona Supreme Court had by its rules clearly articulated that regulation was to displace free market entry and that, in furtherance of this policy, it had affirmatively directed its committee to " 'examine applicants' " for " 'the necessary qualifications' " (J.A. at 102-103).[16]

The Court of Appeal's majority derived its test of specific compulsion from language contained in this Court's opinion in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). That case involved two defendants, one of which was a private county bar association and the other of which, the Virginia State Bar, was designated by state statute as an administrative agency of the Virginia Supreme Court. *Id.* at 776. While the state bar was statutorily authorized to investigate and report violations of the state court's rules to that body, it enjoyed no authority either to regulate the pricing of legal services or to adopt any ethical standards. *Id.* at 790. Indeed, authority as to the latter was by statute expressly reserved to the supreme court itself. *Id.* at 789 n. 18. And pursuant to that authority, the supreme court had adopted ethical codes which "explicitly directed lawyers not 'to be controlled by fee schedules.'" *Id.* at 789.

Nonetheless, the state bar's non-statutory Committee on Economics of Law Practice issued two "minimum-fee-schedule reports" containing schedules of suggested minimum charges which it recommended the state bar consider adopting. *Id.* at 777 n. 4. While the state bar did not act on its committee's recommendation, the county bar association did. Indeed, not only did it adopt such a schedule, but it included therein the gratuitous advice that:

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[15]686 F.2d at 696 (footnote omitted).

[16]686 F.2d at 706 (quoting ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973)).

> "if a lawyer 'purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services . . . [in order to] increase his business with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another.' " *Ibid* (quoting Fairfax County Bar Ass'n minimum fee schedule).

Despite the express contrary dictate of the Virginia Supreme Court,[17] the state bar through its Committee on Legal Ethics thereafter issued an advisory opinion which stated that "evidence that an attorney *habitually* charges less than the suggested minimum fee schedule adopted by his local bar association, raises a presumption that such lawyer is guilty of misconduct . . . ." *Id.* at 777-78 (quoting Opinion No. 170). While the Chief Justice in writing this Court's opinion in *Goldfarb* assumed that the state bar's Committee on Legal Ethics had the general "power to issue ethical opinions," the state bar had apparently failed to cite any statute or Virginia Supreme Court rule which affirmatively addressed the practice. *Id.* at 791. Moreover, as the Chief Justice expressly pointed out, the record contained no indication that such opinions were in any way subject to supervisory review by the Virginia Supreme Court. *Ibid.*

On those facts, this Court stated that "[T]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.* at 790. Finding that none of the conduct in issue was "compelled by direction of the State acting as a sovereign", the Court's analysis with respect to the private county bar was complete. *Id.* at 790-91. With respect to the public state bar, however, the Court's consideration continued, culminating in the following holding:

> "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetititve practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary

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[17]See p. 12 *supra*.

> action, has voluntarily *joined in what is essentially a private anticompetitive activity*, and in that posture cannot claim it is beyond the reach of the Sherman Act." *Id.* at 791-92 (citations and footnotes omitted, emphasis added).[18]

Goldfarb accordingly does not stand for the proposition that immunity with respect to all state agency conduct is dependent on sovereign compulsion. Indeed, just as some portion of a state agency's activity being official does not entitle it to have other essentially private conduct evaluated as if it were public, so likewise the fact that some portion of a state agency's activity may be private does not condemn it to have other conduct which is official evaluated as if it were not. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).[19]

The other leading decision of this Court which rejected a state-action immunity defense because the conduct in issue was not sufficiently compelled also concerned private action. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). There an electric power utility argued that its free light-bulb-exchange program was immune from attack as an illegal tie-in because it was set forth in

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[18]In support of this holding the Court cited to that portion of the opinion in *Parker v. Brown* itself where Chief Justice Stone had pointed out that the case did not involve "the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade . . . ." *See* 317 U.S. at 351-52.

[19]In *Bates* the Court considered a challenge to the validity of an ethical rule promulgated by the Arizona Supreme Court and enforced by means of disciplinary proceedings initiated by the state bar. The only language in this Court's opinion having any commonality with the semantics of the "compulsion" cases was the inapposite observation that the rule itself was subject to state action immunity because it represented "the affirmative command" of the " 'State acting as a sovereign.' " 433 U.S. at 360. By contrast, in determining the applicability of the state action exemption to the state bar's activity in connection with its enforcement of the rule, the Court spoke only of the bar serving in a "defined" role as the "agent of the court" while subject to "continuous supervision" by way of the aggrieved party's right to judicial review. *Id.* at 361. That analysis anticipated exactly the Court's subsequent elaboration of the sovereign authorization test articulated in *Lafayette* and *Boulder* and demonstrates the full applicability of that test to the present situation. See discussion at pp. 15-16 *infra*.

a tariff approved by the state public utility commission. In rejecting this defense on the ground that the utility enjoyed effective freedom to either file, withhold, or withdraw the tariff in question, Justice Stevens emphasized the private nature of the conduct in issue and repeatedly suggested that the Court's decision might well have been different had the official conduct of the public utility commissioners been the subject of suit. *Id.* at 585, 589, 591 n. 24, 601.[20]

Indeed, that precise distinction was made clear in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). There the Court for the first time considered a claim for antitrust redress based upon the official conduct of a subordinate governmental unit.[21] Justice Brennan, writing for a four-Justice plurality,[22] pointed out the fundamental difference between such a claim and the one considered in *Cantor:*

> "*Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement. The situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as agents of the State." 435 U.S. at 410-11 n. 40.

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[20]The last three of these references are to portions of Justice Stevens' opinion in which only three other justices joined. *See* 428 U.S. at 581 n. †.

[21]Previous cases concerning the appropriateness of official state conduct under the federal antitrust laws involved only the question of whether the state scheme was preempted and thus unenforceable. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Parker v. Brown*, 317 U.S. 341 (1943); *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904). *See also California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (post-*Lafayette* preemption cases). None of these cases considered whether or not the official conduct of any agency or official could result in an exposure to antitrust liability.

[22]The position of the four-Justice plurality in *Lafayette* has since been adopted by a majority of the Court. *See Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982).

Having so cleaned the precedential slate, Justice Brennan formulated an entirely new test which required that the conduct in issue be an act of government undertaken by the agency "pursuant to state policy to displace competition with regulation or monopoly public service," *id.* at 413, and that such policy must be "clearly articulated and affirmatively expressed." *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, at 52 (1982). In order to qualify pursuant to that standard, the conduct of the subordinate agency must have been "authorized *or* directed by the state." *City of Lafayette, supra*, at 414 (emphasis added). In discussing the form of authorization required, Justice Brennan made clear that it was not necessary to point to any state consideration of the specific conduct in question, so long as it "is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415 (quoting the opinion below, 532 F.2d 431, 434 (5th Cir. 1976)).

The degree of generality embraced by this standard was considered in *Boulder*. The Court there rejected the argument that a state's summary delegation of home rule power to a city " 'comprehended within the powers granted' " Boulder's enactment of an allegedly anticompetitive CATV franchise ordinance. *City of Boulder, supra*, at 55. That conclusion was based on the Court's determination that such a general delegation of power which did not even address CATV franchising was necessarily neutral with respect to the question of whether economic regulation or free-market competition was contemplated by the legislature as the appropriate mode of industry structure. *Ibid.* The Court went on to suggest, however, that the result might well have been different had Colorado's statute embraced "an affirmative addressing" of the concept of CATV regulation. *Ibid.*

Indeed, any requirement that the sovereign's authorization contain an articulation of every regulatory detail would effectively undermine state government's use of administrative agencies. As recognized by this Court in another context:

> "But the effectiveness of both the legislative and administrative processes would become endangered if [the sovereign] were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the

> burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (considering claim that statute delegating broad discretion to federal agency constituted an unconstitutional delegation of legislative power).

The present antitrust challenge of an agency-implemented statistical grading methodology is analytically indistinguishable from future complaints that a particular examination question was not authorized by a sovereign mandate to determine qualification because it was unfairly difficult; that the relative number of points assigned a particular examination question was not authorized by a sovereign mandate to determine qualification because the subject occupies a disproportionately smaller part of the overall legal practice; or that an examination session limited to three hours was not authorized by a sovereign mandate to determine qualification because a lawyer working in his office could take a longer time to analyze the problem. If each of these and a myriad of other committee determinations must be specifically mandated by the state court, it had better administer its own examination.

But this Court's requirement that subordinate state agencies operate pursuant to clearly indicated sovereign policy to displace competition with regulation never contemplated any necessity for the articulation of such regulatory detail. And inasmuch as the present case involves only official action of state agents, it is the *Lafayette-Boulder* "state authorization" test rather than any *Goldfarb-Cantor* "compulsion" test which controls. On applying that test in the present setting, there can be no question but that the state acting as sovereign contemplated that regulation rather than free market entry was to govern the admission of applicants to the bar. ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). To that end, the Committee on Examination and Admissions was, among other things, directed to "examine applicants and recommend to [the] court for admission to practice applicants who are found by the committee to have the necessary qualifications." *Ibid.* Clearly, such authorization "contemplates" that the committee would establish both standards and grading procedures by which it would determine its recommendations.

While the particular grading procedure chosen was wholly appropriate to this end,[23] the availability of the state action exemption in no way turns on that fact. Even if the system chosen were deemed unduly or arbitrarily restrictive, it would not change the fact that the state as sovereign contemplated the general "kind of action complained of" as opposed to the "specific" challenged conduct. *See City of Lafayette, supra,* at 415. The most that could reasonably be said is that the committee, while operating within its general ambit of authority, committed error by adopting an inappropriate grading system. But as pointed out by Professor Areeda:

> "If an allegation of agency error or other unauthorized action is enough to deny antitrust immunity for public agencies, virtually every zoning decision, franchise grant, utility tariff ruling, or other routine governmental act will be subject to antitrust scrutiny. *Lafayette's* authorization requirement should not be read to transform most review of state administrative law into a federal antitrust task. The key factor in *Parker* and for all the *Lafayette* Justices was the existence of a state policy that intentionally displaces antitrust law. Erroneous application of that policy by local officials does not negate the underlying state authorization." Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. LAW REV. 435, at 450 (1981).

That position not only represents sound policy, but it clearly comports with both *Lafayette's* and *Boulder's* teachings as to the generality of authorization which will be deemed sufficient once a clearly articulated state policy to supplant competition is found.

B. The Availability of Arizona Supreme Court Review of Its Committee's Admission Recommendations Satisfies Any Applicable Requirement for Active State Supervision.

The Court of Appeals majority did not have occasion to resolve the question of state supervision, a separate aspect of state-action immunity which was most fully discussed in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980). The Court there held California's "fair-trade"

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[23]See discussion at pp. 7-8, *supra*.

law relating to wine pricing preempted by the Sherman Act. Although the pricing scheme was sufficiently articulated as state policy, California simply enforced "the prices established by private parties" without either review or regulation. *Ibid.* The Court held that a statute which permitted such unsupervised private conduct did not enjoy state-action immunity and accordingly conflicted with the Sherman Act. While *Midcal* makes clear that private conduct will not qualify for state action immunity unless it is supervised by an agency of the state, the decision does not address whether or to what extent state agency action must itself be supervised by the ultimate sovereign.

In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), the Court determined that a statutory scheme regulating the establishment and relocation of automobile dealerships represented valid state action which was not preempted by the Sherman Act. While the Court pointed out that the role which the statute accorded private conduct was subject to supervision by a state board, it apparently did not deem it material to explore whether that board was itself subject to sovereign supervision. *See* 439 U.S. at 110. On the other hand, in finding the Arizona State Bar's role in lawyer disciplinary proceedings valid state action, the Court seemed to place some emphasis on the supervisory function performed by the Arizona Supreme Court. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977). Impliedly acknowledging that there has been no definitive determination with respect to any requirement that subordinate governmental units be supervised, the Court in *Boulder* expressly noted that it was not reaching the question of whether the city ordinance there in issue "must or could satisfy the 'active state supervision' test focused upon in *Midcal*." 455 U.S. at 51-52 n. 14.

While it seems clear from *New Motor Vehicle Board* that not all state agencies are subject to an active supervision requirement, it is less clear that none are. Perhaps the key lies in the degree to which they are structurally independent of the area of activity which they regulate. *Compare, cf., Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 508-10 (4th Cir. 1959), *with Allstate Insurance Company v. Lanier*, 361 F.2d 870, 873 (4th Cir. 1966).

But whatever the test that this Court may ultimately formulate, and whatever its applicability to Petitioners, it is clear from this Court's holding in *Bates* that the supervisory role played by the Arizona Supreme Court fully satisfies any requirement that may be imposed.[24] If anything, the Arizona Supreme Court's directly appointed committee is more independent of the admissions process than was the lawyer-elected[25] Board of Governors independent of the disciplinary process considered in that case. *See Bates v. State Bar of Arizona, supra,* at 356.

C. Petitioners in Any Event Enjoy Immunity From Civil Damage Liability Which Is Sought to Be Imposed on Account of Their Official Conduct.

This Court has not as yet found it necessary to determine whether public officials are answerable in personal damages on account of official conduct found violative of the antitrust laws.[26] Should the Court conclude, however, that the claim set forth in the present complaint is not substantively negated by the state-action immunity doctrine, that remedy issue will be presented. The only relief sought in the complaint is treble-damages, and the only defendants remaining are public officials. If a damage remedy does not lie against such officials, the complaint will necessarily fail to state a claim on which relief can be granted,[27] and the Court of Appeals' reversal of the District Court's dis-

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[24]As was true of the Board of Governor's disciplinary determination in *Bates*, the present committee's admission recommendations are subject to full review by the Arizona Supreme Court. ARIZ. REV. STATS. ANN. 17A, rule 28(c) XII E.(c) (West 1973), *as amended*, rule 28(c) XII F.1 (West Supp. 1982).

[25]*See* ARIZ. REV. STATS. ANN. 17A, rule 27(e) 4 (West Supp. 1982).

[26]The complaints in *Boulder* and *Lafayette* sought injunctive relief as well as damages and thus stated a claim without regard to the availability of a damage remedy. 455 U.S. at 46; 435 U.S. at 392. The complaint in *Cantor* did not name any public official as a defendant. 428 U.S. at 585.

[27]*Imbler v. Pachtman*, 424 U.S. 409, 416 (1976).

missal will have been error.[28]

The question of whether and to what extent a damage remedy is available under the Sherman Act is a matter of statutory construction. *Cf. Briscoe v. Lahue*, ... U.S. ...., 103 S.Ct. 1108, 1111 (1983). This Court has on numerous occasions determined that Congress' use of such general statutory language as "every person . . . shall be answerable . . . for damages" does not necessarily indicate a Congressional intention to abrogate established common law damage immunities. *E.g., Imbler v. Pachtman*, 424 U.S. 409, at 417 (1976) (interpreting the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976)).[29] The question in each instance is whether "the same considerations of public policy that underlie the common-law rule likewise countenance" immunity under the statute. *Id.* at 424.

The conduct of the admission function requires such substantial time and attention that no court can any longer be expected to meet its admission responsibilities alone. Indeed, the California Supreme Court long ago observed: "No court can so examine

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[28]The court below thought that the "case's preliminary posture" made it unnecessary to address the remedy issue. (J.A. 80, n. 5, 686 F.2d 697 n. 5.) But since the unavailability of a damage remedy would have validated the District Court's dismissal, this was error. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). There is a closer question as to whether the remedy issue is presented for this Court's review by the Petition for Certiorari. However, the Petition does tender the question as to whether the acts of the Petitioners undertaken in the course of their membership on a state committee are "immune from federal antitrust liability" on account of their state action status. Where the only liability sought to be imposed is damage liability, the issue of whether such a remedy is available with respect to such governmental action would appear fairly embraced within the question framed.

[29]The comparable language in Section 5 of the Clayton Act is: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15 (1976). This section supersedes a similar section contained in the original Sherman Act. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210. This Court has noted in the immunity context that there is precedent for giving the Sherman Act less than a "literal reading". *See Briscoe v. Lahue, supra*, at ...., 103 S.Ct. at 1113 n. 8.

more than five hundred, or nearly a thousand, applicants and conduct its regular business." *In re Admission to Practice Law*, 1 Cal. 2d 61, at 69, 33 P.2d 829, at 832 (1934). Those 1000 applicants of 1934 have become today's 12,000. *See* note 1 *supra*, p. 5.

The near universal solution has been the establishment of an administrative adjunct to the court, such as Arizona's Committee on Examinations and Admissions. BAR ADMISSION RULES AND STUDENT PRACTICE RULES 30-33, chart IV (F. Klein ed. 1978). Such agencies variously recommend and/or establish rules and procedures for the conduct of the bar examination, administer and grade the examination, and recommend successful candidates for admission. *Id.* at 37-38. All this activity takes place under the supervisory authority of the state's highest court which retains to itself the ultimate power to admit or not and the ultimate authority to establish the rules pursuant to which it will or will not do so. *E.g. Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1958); *In re Admission to Practice Law*, 1 Cal. 2d 61, 33 P.2d 829 (1934); *see also* BAR ADMISSION RULES AND STUDENT PRACTICE RULES, *supra*, at 29.

In performing these various tasks, the committee's work might variously be described as legislative,[30] ministerial,[31] or quasi-prosecutorial.[32] But whatever the arguably least ill-fitting of these imperfectly tailored precedential garments, one thing appears clear:

> "it is literally impossible, in view of the complexities of the modern [judicial] process, with [courts] almost constantly in session and matters of [judicial] concern constantly proliferating, for Members of [the courts] to perform their [judicial and] legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the [judge's] performance that they must be treated as the latter's alter egos [in the admissions process]. . . ." *Gravel v. United States*, 408 U.S. 606, at 616-17 (1972) (adaptation of opinion according derivative absolute im-

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[30]*Cf. Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 731 (1980).

[31]*See In re Sommers*, 325 U.S. 561, 565-66 (1945).

[32]*Cf. Butz v. Economou*, 438 U.S. 478, 515 (1978).

munity to an aide of a Member of Congress).

In determining whether an applicant is qualified for admission to its bar, the Arizona Supreme Court is engaged in a judicial act; *District of Columbia Court of Appeals v. Feldman*, ... U.S. ...., 103 S.Ct. 1303, 1313 (1983); while in establishing generally applicable admission qualifications, the court is engaged in a legislative act. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, at 731 (1980). In both instances the court and its members enjoy absolute immunity from damage liability premised on such conduct. *Pierson v. Ray*, 386 U.S. 547 (1967); *Supreme Court of Virginia v. Consumers Union of the United States, supra* at 734. For reasons parallel to those relied upon in *Gravel* in extending the absolute immunity of a Congressman to his aide,[33] Petitioners have a strong derivative claim to the immunity enjoyed by the members of the Arizona Supreme Court with respect to the admissions process.

Moreover, were this a suit under 42 U.S.C. § 1983, Petitioners would have a strong claim pursuant to this Court's "functional" immunity doctrine. *See Butz v. Economou*, 438 U.S. 478, at 508-517 (1978). Petitioners' activity in failing to recommend an applicant to the court is functionally equivalent to the activity of an agency counsel in initiating quasi-judicial proceedings. *See Application of Levine*, 97 Ariz. 88, 397 P.2d 205, 207 (1965). In both cases the administrative action is but a preliminary to a plenary judicial determination. Thus, like the discretion of those initiating agency proceedings, the judgment which the Petitioners exercise in administering the admissions process "might be distorted if their immunity from damages arising from [a failure to recommend an applicant] was less than complete. While there is not likely to be anyone willing and legally able to seek damages from the officials if they [recommend admission], there is a serious danger that the decision to [withhold a recommendation] will provoke a retaliatory response." *Id.* at 515 (citation omit-

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[33]*Gravel v. United States, supra*, 616-19. While *Gravel* relied in part on the Speech and Debate Clause of the federal Constitution, its holding was not dependent on the applicability of that provision. *See Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403-405 (1979).

ted).[34] As observed by Judge Learned Hand, "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, at 581 (2d Cir. 1949).

Moreover, even if Petitioners' activities are viewed as nothing more than executive administration, in the context of a civil rights suit they would nevertheless enjoy at least qualified damage immunity. *Butz v. Economou, supra*, at 504-508; *Scheuer v. Rhodes*, 416 U.S. 232, at 247-48 (1974). Under such immunity, an official is entitled to judgment "if the law" at the time the challenged activity occurred "was not clearly established" so that he or she could not "fairly be said to 'know' that the law forbade" the conduct in question. *Harlow v. Fitzgerald*, ... U.S. ...., 102 S.Ct. 2727, at 2739 (1982). As of the early 1974 time frame here relevant, this Court had never suggested that state officials' performance of their local governmental responsibilities might place them in personal jeopardy of the Sherman Act.[35] Indeed, in Petitioners' circuit it was clear law that state agencies and subdivisions enjoyed absolute status immunity even as to their proprietary, much less governmental, activities. *See State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974). Petitioners would accordingly appear entitled to *Harlow* immunity on the face of Respondent's complaint.[36]

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[34]The quotation is an adaptation of the portion of the Court's opinion which accords absolute immunity to agency officials for their activities in initiating quasi-judicial proceedings.

[35]The only three state action exemption cases considered to that time were preemption cases. In both *Parker v. Brown*, 317 U.S. 341 (1943), and *Olsen v. Smith*, 195 U.S. 332 (1904), the Court held the state action in issue beyond the scope of the Sherman Act. In the only other case, the Court focused principally on Congress' intent in passing the Miller-Tydings Act. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

[36]Under *Harlow* qualified immunity constitutes an affirmative defense. .... U.S. at ...., 102 S.Ct. at 2737. However, where, as here, the applicability of such a defense appears from the face of the complaint, dismissal for failure to state a claim is proper. *E.g., Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980) (statute of limitations); *Williams v. Murdoch*, 330 F.2d 745 (3d Cir. 1964) (res judicata); *Ginsburg v. Black*, 192 F.2d 823 (7th Cir. 1951) (privilege).

Moreover, the immunity decisions heretofore discussed all involved civil rights actions in which the plaintiff complained that the defendant official had deprived the claimant of his Constitutional rights under color of law.[37] In this context, a claim lies against state officials under the Civil Rights Act of 1871 "only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961). Accordingly, all "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity" less the exception consume the statute. *Scheuer v. Rhodes, supra*, at 243 (1974).

The Sherman Act, on the other hand, is principally directed against private restraints and trusts. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943). In that context, there is far less basis for inferring from any general statutory language a Congressional intent to limit established common law immunities otherwise accorded public officials. Accordingly, the scope of absolute immunity available to public officials under the Sherman Act should, if anything, be significantly broader than that which is available in the civil rights context. Given our federalist form of government and its dual regulatory sovereignty, the full range of damage immunity available at common law must be preserved lest state officials be deterred from the vigorous exercise of the important state responsibilities necessarily delegated to them. Such preservation would clearly shield Petitioners from the damage claim set forth in the present complaint. *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Kendall v. Stokes*, 44 U.S. (3 How.) 86 (1847).

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[37]The single exception is *Gravel v. United States* which involved the question of immunity from grand jury process. *See* 408 U.S. at 608-609.

V.
CONCLUSION.

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with directions to affirm the District Court's dismissal of Respondent's complaint.

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August, 1983